IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1911 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JYOTI SWITCH GEARS LIMITED

Versus

DIPSINGH D RATHOD

Appearance:

1. Special Civil Application No. 1911 of 1997
Mr. Tejas Barot for M/S TRIVEDI & GUPTA
for Petitioner No. 1
MR PC MASTER for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 08/09/2004

ORAL JUDGEMENT

Heard learned advocate Mr. Barot for M/s. Trivedi

& Gupta for the petitioner and Mr. Master, learned advocate for the respondent workman.

In this petition under Article 227 of the Constitution of India, the petitioner company has challenged the award made by the Labour Court, Anand in Reference No. 225 of 1991 (Old No. 772/86) dated 12th August, 1996 wherein the labour court has, while setting aside the order of dismissal, granted reinstatement with continuity of service with 60 per cent back wages for the intervening period, with costs of Rs.500.00. Initially, while admitting the petition by issuing rule thereon, this Court passed the following order on 21st March, 1997:

"Mr. Vyas for M/s. Trivedi & Gupta for petitioner.

Rule returnable by 8.4.1997. Learned Counsel for the petitioner submits that the orders with regard to the reinstatement of the respondent workman in terms of the award shall be issued immediately. It is directed that the respondent workman shall also be paid due wages from the date of the award till the date of his reinstatement on or before 7.4.1997. The award in respect of the relief of 50 % of the back wages shall remain stayed. Direct Service is permitted."

Thus, while admitting the petition, this court directed the petitioner to reinstate the workman as per the award immediately and to pay wages from the date of the award till the date of his actual reinstatement on or before 7th April, 1997. Award qua back wages has been stayed by this Court.

Learned advocate Mr. Barot appearing for the petitioner company has submitted that the labour court has erred in granting reinstatement with 60% back wages for the intervening period. It was his submission that in April, 1985 and May, 1985, for 31 days in all, the respondent workman had remained absent for which show cause notice was served upon the respondent and after departmental inquiry, he was dismissed from service. He also submits that the labour court has committed gross error in considering that leave were there in the account of the respondent and, therefore, punishment of dismissal is illegal. He also submits that the labour court has erred in believing that the medical certificate was produced by the workman before the petitioner. He also

submits that the labour court has erred in not appreciating that the proposal of the petitioner company for medical examination of the respondent was refused by the respondent. He also submits that the medical certificate was not produced before the inquiry officer. According to him, the respondent was gainfully employed in a way that he was doing agricultural operations in his own agricultural land and, therefore, back wages ought not to have been granted by the labour court while reinstating the respondent workman. He further submits that the labour court has erred in not properly appreciating the evidence on record as led before the Inquiry Officer and, therefore, award in question is required to be set aside while dismissing the reference made at the instance of the workman. He also submits that as per the directions issued by this court while admitting the petition, the workman was reinstated in service. He read over the important part of the award in question before this court and submits that before the labour court, it was not in dispute that the workman had remained absent from duty for 31 days in all and, therefore, the labour court was not justified in granting reinstatement since the inquiry was held to be legal and valid and not vitiated for any other reason. IN short, it was his submission that the award of reinstatement with 60 per cent back wages is not sustainable in law and, therefore, same is required to be quashed and set aside. Except these submissions, no other submissions were made by Mr. Barot for the petitioner.

On the other hand, learned advocate Mr. Master appearing for the workman has supported the award in question. He also accepted that the workman was reinstated in service.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question. The workman had remained absent for 24 days in April, 1985 and 7 days in May,1985. Thus, the workman remained absent for 31 days in all in April and May, 1985 and, therefore, the respondent was served with a show cause notice and thereafter, departmental inquiry was held against him and after completion of the departmental inquiry, the respondent was dismissed from service for his having remained absent for 31 days, 24 days in April, 1985 and 7 days in May,1985.

Before the labour court, statement of claim was filed by the workman vide Exh.3 and the reply thereto was filed by the petitioner vide Exh. 8. Vide application Exh. 7, workman had demanded for production of certain

documents by the petitioner but no reply to the said application Exh. 7 was filed by the petitioner and ultimately, the labour court had directed the petitioner to produce such documents as demanded by the workman as per application Exh. 7. Documents of inquiry papers were admitted and exhibited before the labour court vide Exh. 22 to 60. Vide Exh. 20, the workman was examined before the labour court. Thereafter, the matter was considered by the labour court on merits.

From the perusal of the award in question as well as the documents in question, it appears that the workman had remained absent for 31 days in all during April and May, 1985 for which departmental inquiry was initiated against the workman and thereafter, he was dismissed from service. Except that, it is not the case of the petitioner that the workman is used to remain absent frequently. No such allegation has been made against the workman. From the record, it appears that the workman had completed eleven years of service prior to the dismissal from service and yet the petitioner has not pointed out any such bad past record of the petitioner. The labour court has, in terms, observed that it is not in dispute that the workman had remained absent as per notice Exh. 22. IN light of this admitted position, the labour court examined as to whether the workman had remained absent on any genuine and reasonable ground or not. For examining that aspect, the labour court observed that at the time when the workman was absent, he was sick and he had produced medical certificate before the concerned authority of the petitioner company. Since the factum of production of medical certificate was denied by the petitioner, the labour court appreciated the evidence at page 32 and observed that vide Exh. 8, in reply, the petitioner has denied the fact that the respondent has produced medical certificate but certain documents were produced by the petitioner vide list Exh. 9 and as per item no.5 thereof (Exh.26), it was clear that the workman had, by letter dated 27th May, 1985, produced medical certificate before the petitioner and requested the petitioner to sanction sick leave. After appreciation of the evidence on record, the labour court came to the conclusion that for remaining absent for 31 days in April and May, 1985, the respondent had produced medical certificate before the petitioner. The petitioner had not produced certain documents which were demanded by the respondent vide application Exh. 7. No reply to the said application Exh. 7 was filed by the petitioner and inspite of the order of the labour court below Exh. 7, no documents were produced by the petitioner and that fact was also taken into

consideration by the labour court. Save and except the charge of his having remained absent from April and May, 1985, for 31 days in all, as mentioned in Notice Exh. 22, no other submissions were made before the labour court about any such similar or any other misconduct committed by the respondent workman during his eleven years service prior to dismissal and that aspect was appreciated by the labour court while considering the evidence of the witness for the petitioner at page 25, question no. 23 and 24. At page 9 of the award, the labour court observed that the witness of the company in answer to question no.23 and 24 at page 25 of the inquiry papers stated that in the account of the respondent, in April,1985, 35 earned leave, 6 casual leave and 29 medical leave were in balance and, thus, in all 70 leave were there in balance in the account of the respondent workman and the workman had lost presence bonus only in April and May, 1985 and after appreciating this statement of the witness for the petitioner as per page 25 of the papers of inquiry, the labour court inferred that since the workman had lost the Presence Bonus only for April and May, 1985, the workman had never remained absent during his service in a wrong manner except for April and May, 1985, and he is not used to remain absent in such a manner. Thereafter, the labour court considered one more aspect as regards contention of the petitioner that the respondent refused for being examined by the Doctor of the petitioner company. While considering that contention of the petitioner, the labour court observed that in response to the said proposal of the petitioner for examining the respondent through its own Doctor, the respondent requested for being examined through Civil Surgeon and that request made by the respondent was not accepted by the petitioner and no reason for not accepting such request was given by the petitioner. Therefore, considering the entire facts, ultimately, the labour court considered the matter that the petitioner has not suspected or doubted the genuineness of the medical certificate produced by the respondent that it is false or fabricated or not genuine. Therefore, the labour court believed that the medical certificate produced by the workman was right and genuine and, therefore, same was relied upon by the labour court. Ultimately, while examining the matter under section 11A of the ID Act, 1947, the labour court came to the conclusion that looking to the gravity of misconduct of having remained absent for 31 days during April and May, 1985, on the ground of sickness supported by medical certificate produced before the petitioner, punishment of dismissal from service is unjust and harsh. In view of such conclusion, the labour court, while exercising the

powers under section 11A of the ID Act, 1947, set aside the order of dismissal as harsh and unjustified considering the gravity of the alleged misconduct.

Thereafter, the labour court examined the aspect of back wages for the intervening period. The labour court observed that the workman was doing some agricultural work which cannot be considered to be gainful employment. However, considering that aspect that he was earning something and also considering the other relevant aspects of the matter, the labour court granted only 60 % of the back wages for the intervening period. According to my opinion, the labour court was right in appreciating the evidence on record. It is clear from the award that no gainful employment of the respondent workman was proved by the petitioner before the labour court by producing proper evidence in that regard and, therefore, the labour court was right in awarding 60 per cent back wages for the intervening period.

In view of these facts, when the workman had remained absent only for 31 days in April and May,1985 on the ground of sickness by producing medical certificate to that effect before the petitioner company and when the petitioner has not been able to point out that the petitioner is used to remain absent in this manner frequently, when the petitioner has not been able to point out before the labour court any such past bad record of the respondent, according to my opinion, considering the eleven years service of the petitioner for which no such allegation has been made save and except the absence in April and May, 1985, according to my opinion, the labour court was justified in examining the matter under section 11A of the ID Act in light of the aforesaid disputed facts. According to my opinion, the labour court was also justified in holding that looking to the gravity of the alleged misconduct, the punishment of dismissal from service for remaining absent for 31 days in April and May,1985 is extremely harsh and unjustified.

The punishment of dismissal for remaining absent from duty for 31 days is harsh and excessive on the ground that the respondent had completed more than 11 years of service as a permanent workman and in all 70 leave were there in his balance of the account of the respondent including 29 days sick leave and yet the petitioner considered it as a serious misconduct and imposed extreme punishment for remaining absent. The punishment in question is also harsh and unjustified since it has not been pointed out by the petitioner

either before the labour court or before this court that the respondent was used to remain absent in this fashion frequently causing inconvenience to the smooth functioning of the establishment. The punishment of dismissal is harsh and unjustified on the ground that the petitioner has not suspected the genuineness or otherwise of the medical certificate and yet considered the absence as unauthorized absence and imposed the punishment of dismissal without considering his past 11 years service.

This aspect, Whether such proved misconduct of remaining absent would require the extreme and harsh punishment of dismissal or not, has been examined by the apex court in Union of India and others v. Giriraj Sharma [AIR 1994 SC 215]; Syed Zaheer Hussain v. Union of India and others [AIR 1999 SC 3367] and recently in case of police constable in Shri Bhagwanlal Arya versus Commissioner of Police, Delhi and others [2004 SCC (L & S) 661], identical issue was examined by the apex court. The apex court held that the dismissal on the ground of alleged misconduct of such absence from duty is excessive and disproportionate and not permissible under the relevant provisions of the service rules. In that case, the police constable was absent from duty for two months, 7 days and 17 hours on medical ground. These facts are almost similar to the facts of this case. In Shri Bhagwan Lal Arya (supra), the apex court has observed as under in para 12, 13 and 14:

"12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him punishment of removal from service since their earlier order of termination of the appellant's service under the Temporary Service Rules did not materialize. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government doctors as grave misconduct in terms of the Delhi Police (Punishment and Appeal) Rules, 1980. Non application of mind by quasi judicial authorities can be seen in this case. The very fact that the respondents have asked the appellant for re-medical clearly establishes that they had received the applicant's application with medical certificate. This can never be termed as wilful absence without any information to competent authority and can never be termed as grave misconduct.

13. In B.C. Chaturvedi v. Union of India [(1995) 6 SCC 749:1996 SCC (L&S) 80:(1996) 32 ATC

44: AIR 1996 SC 484] (three Judge Bench, the question posed for consideration was as to whether the High COurt/Tribunal can direct the authorities to reconsider punishment with cogent reasons in support thereof or reconsider themselves to shorten the litigation. In this case, at para 18, this Court has observed as under :(SCC p.762)

'18. A review of the above legal position would establish that the disciplinary authority and on appeal the appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High COurt/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.'

14. Thus, present one is a case wherein we are satisfied that the punishment of removal from service imposed on the appellant is not only highly excessive and disproportionate but is also one which was not permissible to be imposed as per the Service Rules. Ordinarily we would have set aside the punishment and sent the matter back to the disciplinary authority for passing the order of punishment afresh in accordance with law and consistently with the principles laid down in the judgment. However, that would further lengthen the life of litigation. In view of the time already lost, we deem it proper to set aside the punishment of removal from service and instead direct the appellant to be reinstated in service subject to the condition that the period during which the appellant remained absent from duty and the period calculated up to the date on which the appellant reports back to duty pursuant to this judgment shall not be counted as a period

spent on duty. The appellant shall not be entitled to any service benefits for this period. Looking at the nature of partial relief allowed hereby to the appellant, it is now not necessary to pass any order of punishment in the departmental proceedings in lieu of the punishment of removal from service which has been set aside. The appellant must report on duty within a period of six weeks from today, to take benefit of this judgment."

Therefore, in light of the aforesaid decisions of the apex court as well as the facts of the present case, according to my opinion, the view taken by the labour court cannot be said to be perverse or baseless. The labour court has rightly exercised the powers under section 11A of the ID Act, 1947 and in doing so, no error has been committed by the labour court. No error apparent on the face of the record has been pointed out by the learned advocate Mr. Barot. No infirmity and/or procedural irregularity has been pointed out by the learned advocate Mr. Barot. This Court is having very limited powers while exercising the jurisdiction under Article 227 of the Constitution of India and, therefore, cannot act as an appellate authority and cannot reappreciate the evidence appreciated by the labour court since it has not been successfully pointed out that the findings given by the labour court are perverse or contrary to the facts on record. Therefore, according to my opinion, the labour court has not committed any irregularity and, therefore, award made by the labour court does not call for interference of this Court in exercise of the powers under Article 227 of the Constitution of India. Therefore, there is no substance in this petition and the same is required to be dismissed.

In the result, for the reasons recorded hereinabove, this petition is dismissed. Rule is discharged. Interim relief granted earlier shall stand vacated with no order as to costs.

(H.K. Rathod,J.)

Vyas